UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	)	Bankr. No. 97-30004
KIRWAN RANCH, a South Dakota partnership Debtor.	)	Chapter 7
JOHN LOVALD, Trustee Plaintiff,	)	Adv. No. 99-3001
-vs-	)	MEMORANDUM OF DECISION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
GERALD R. KIRWAN, JR. and LEONA J. KIRWAN Defendants.	)	

The matter before the Court is Defendants' Motion for Summary Judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendants' Motion must be denied.

I.

SUMMARY OF FACTS (in a light most favorable to Plaintiff-Trustee Lovald, the nonmoving party). The partners of the Kirwan Ranch Partnership (the Partnership) were James T. and Shirley M. Kirwan and their sons, William P. Kirwan and James P. Kirwan. Beginning in 1991, the Partnership was a tenant in common with David Vanderwerf on 680 acres of land that had been purchased from Robert and Eva Matthews (the Matthews land). The Matthews land was mortgaged to First United Bank of O'Neill, Nebraska for $97,047.20. By 1995, the Partnership owned (separate from the Matthews land)

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another 1,551 acres of real property in south central South Dakota (partnership land). The partnership land was mortgaged to Commercial Bank of Wagner, South Dakota for $291,302.85. A trailer home on the partnership property was separately mortgaged for $20,000 to Nebraska State Bank of Bristow.

The Partnership and its partners experienced financial difficulties. Under some sort of refinancing pretext, the Partnership obtained a quit claim deed from Vanderwerf on the Matthews land and recorded the deed on September 6, 1995. On December 12, 1995, without Vanderwerf's knowledge, the Partnership gave a contract for deed for all the partnership land and the Matthews land to Gerald and Leona Kirwan, relatives of the partners. The purchase price was $710,000 ($690,000 on the contract and another $20,000 to pay the mobile home loan). All the property was appraised at $890,000 on December 29, 1995. A Notice of Contract was filed December 15, 1995.

With $440,000 in financing that Gerald Kirwan had obtained from First Western Bank of Atkinson, Nebraska, Gerald and Leona Kirwan paid all the mortgages on the Matthews and partnership property and the sale closed on April 26, 1996. Gerald and Leona Kirwan's mortgage to First Western Bank was recorded May 6, 1996. As additional consideration for the partnership and Matthews land, Gerald and Leona Kirwan also gave the Partnership 4.4 shares of K+ Angus Ranch, Inc. No stocks of K+ Angus Ranch were ever transferred to the Partnership. Instead, 4.4 new shares were issued to the individual Kirwan Ranch partners, who were not the sellers. These new shares were held by a law firm on the partners'

behalf beginning December 12, 1995. In shareholder minutes for K+ Angus Ranch dated January 1, 1996, neither the Partnership nor the Kirwan Ranch partners were listed as stockholders; only Gerald and Leona Kirwan were acknowledged as shareholders on the waiver of notice.

When Vanderwerf threatened suit, William P. Kirwan, a Jim Kirwan[1], and David Vanderwerf signed an agreement. The agreement stated that the quit claim deed on the Matthews property had been obtained for "accommodation services only" and that the deed would be returned to Vanderwerf if they did not obtain financing. If financing was obtained, Vanderwerf was to be paid $69,000 for his interest in the Matthews land. The agreement was signed December 29, 1995, *after* the Partnership had contracted to sell the Matthews and partnership land to Gerald and Leona Kirwan.

In early 1996, Gerald Kirwan and James T. Kirwan formed a new corporation called Randall Ranch, Inc. The articles of incorporation were filed March 18, 1996. On April 1, 1996, Gerald and Leona Kirwan sold all their interest in Randall Ranch to the individual Kirwan Ranch partners for $270,000, which was the balance due on the land sale from the Partnership. The partners were to make ten annual payments beginning December 15, 1996 with 10% interest. Gerald and Leona Kirwan took as security the 4.4 shares of K+ Angus Ranch stock that was held by the individual Kirwan Ranch partners and the shares of Randall Ranch stock that

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[1] It is not clear whether this was James P. Kirwan or James T. Kirwan.

were being transferred. After they had contracted to sell their interest in Randall Ranch, Gerald and Leona Kirwan transferred the Matthews and partnership real property to Randall Ranch by deed dated June 4, 1996. The deed was recorded June 10, 1996.

Amidst all these transfers, on May 16, 1996, Vanderwerf and his parents filed suit in state court against the individual Kirwan Ranch partners, Gerald and Leona Kirwan, and First Trust National Association. The state court granted summary judgment to Gerald and Leona Kirwan and First Trust. It concluded that Gerald and Leona Kirwan were bona fide purchasers of the Matthews and partnership real property who were without notice of Vanderwerf's interest at the time of the purchase. The court also concluded that First Trust held a valid mortgage on the realty.

On December 18, 1996, Gerald and Leona Kirwan and the Kirwan Ranch partners executed a "Settlement Agreement." It provided that the partners had paid Gerald and Leona Kirwan for their interest in Randall Ranch, that all the K+ Angus Ranch stock went back to Gerald and Leona Kirwan unencumbered, and that all the Randall Ranch stock went to the individual Kirwan Ranch partners unencumbered. As a result of these transactions, title to the Matthews and partnership real property was transferred through Gerald and Leona Kirwan to the new Randall Ranch corporation, which was held by the former Kirwan Ranch partners. Equity in the Matthews and partnership property at the time it was owned by the Partnership had evaporated.

The Partnership filed a Chapter 12 petition in bankruptcy on January 17, 1997. It was a companion case to Chapter 12 cases

filed by its partners.[2] The Partnership converted from a Chapter 12 case to a Chapter 7 case on April 18, 1997.

Vanderwerf and his parents obtained relief from the automatic stay on July 17, 1997 to continue the state court litigation against the individual Kirwan Ranch partners, except James P. Kirwan. The relief from stay order was affirmed on appeal. On December 5, 1997, the state court concluded that the Kirwan Ranch partners had fraudulently obtained the Matthews property from Vanderwerf. Vanderwerf obtained judgment against James T. Kirwan, William P. Kirwan, and Shirley M. Kirwan for $83,300, plus pre-judgment interest. *See Vanderwerf v. Kirwan*, civ. no. 96-31, slip op. (Sixth Judicial Circuit, S.D. December 5, 1997). Before the Bankruptcy Court, Vanderwerf then commenced fraud-based non dischargeability complaints against these partners, but the complaints were dismissed because they had not been timely filed.

On January 15, 1999, the trustee for the Partnership's Chapter 7 case, John S. Lovald, commenced this adversary proceeding against Gerald Kirwan and Leona Kirwan. He alleged that the transfer of the partnership and Matthews real property to them was for less than reasonably equivalent value and that the transfer was made with an actual intent to defraud creditors and thus the transfer was voidable as fraudulent. In the alternative, the Trustee alleged that the Partnership-Debtor's transfer of the K+ Angus Ranch stock to Gerald and Leona Kirwan was a preferential

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[2] *In re James T. and Shirley M. Kirwan*, Bankr. No. 97-30003; *In re William P. Kirwan*, Bankr. No. 97-30005, and *In re James P. Kirwan*, Bankr. No. 97-30006. A plan has been confirmed in each.

transfer made within 90 days of filing on account of an antecedent debt when the Partnership was insolvent. Trustee Lovald cited §§ 542, 544 and 548(a)(1) of the Bankruptcy Code in his complaint.

Gerald and Leona Kirwan answered on February 12, 1999. They stated the District Court had jurisdiction and that they were bona fide purchasers of the real property as previously concluded by the South Dakota Supreme Court in *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998). They admitted two transfer dates (the contract for deed recorded in December 1995 and the warranty deed recorded in April 1996), but claimed they had paid full value for the property. They also denied that the April 1996 transfer was on account of an antecedent debt. As an affirmative defense, Gerald and Leona Kirwan alleged that all or some of Trustee Lovald's claims were barred by *res judicata* or collateral estoppel and that Trustee Lovald did not have standing to bring a fraudulent transfer action. The Kirwans demanded a jury trial.

In *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998), the South Dakota Supreme Court affirmed the lower court's decision that Gerald and Leona Kirwan were bona fide purchasers of the subject real property from the partnership in April 1996 without notice of the interest in the Matthews property held by Vanderwerf. The opinion did not address whether the transfer had been for a reasonable consideration. Further, the opinion was entered before Gerald and Leona Kirwan's later conveyance of the Matthews and partnership property to Randall Ranch, Gerald and Leona Kirwan's retaking of the K+ Angus Ranch stock from the individual Kirwan

Ranch partners, and Gerald and Leona Kirwans' divestment of any interest they had in Randall Ranch.

Gerald and Leona Kirwan moved for withdrawal of reference of this adversary by the United States District Court. That motion was essentially denied and the District Court[3] specifically authorized the Bankruptcy Court to conduct a jury trial.[4]

On June 14, 1999, Gerald and Leona Kirwan moved for summary judgment. Relying on December 15, 1995 as the relevant transfer date for the sale of the Matthews and partnership realty, the Gerald and Leona Kirwan argued that the transfer fell outside the one-year pre-petition time limit provided by § 548. They also argued that this matter is *res judicata* based upon the South Dakota Supreme Court's earlier decision, *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998). Finally, they argued that the K+ Angus Ranch stock, which is the property Trustee Lovald claims was preferentially transferred, was never owned by Debtor-Partnership but was owned individually by the Kirwan Ranch partners and thus was not bankruptcy estate property.

As argued by Trustee Lovald:

> [I]f the land and mobile home was worth $710,000 as claimed by Gerald (G. Kirwan Depo. p. 21) then after deducting the $440,000 mortgage there was equity of $270,000. 38% of $270,000 equals $102,600. Thus, the partners entered into transfer agreements designed to fail whereby K+ stock allegedly worth $270,000 was transferred back to Gerald and Leona [Kirwan] for

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[3] The Hon. Charles B. Kornmann presiding.

[4] A standing order authorizing this Court to conduct jury trials was entered December 22, 1994 following the adoption of 128 U.S.C. § 157(e).

> $102,600. This transfer occurred on December 18 and 19, 1996 and within 90 days of the bankruptcy filing and falls within the scope of 11 U.S.C. § 547(b). It was made to a creditor for or on account of an antecedent debt. It was made while the Partnership was insolvent within 90 days of the bankruptcy petition and enabled Gerald and Leona [Kirwan] to get $270,000 of K+ stock for about $102,600. Thus, the Trustee is entitled to void that transfer.
>
> Since this transfer was also made with intent to hinder, delay or defraud the Partnership's creditors the Trustee is entitled to avoid the same under 11 U.S.C. § 548.

Trustee Lovald asked that the entire deal be voided as fraudulent and that the partnership and Matthews real property be returned to the bankruptcy estate. In the alternative, he wants the Court to void the transfer of the K+ Angus stock as a preference.

In their reply, Gerald and Leona restated their earlier arguments. They also contested some facts that Trustee Lovald had stated were not disputed. Several of these disputed facts (the involvement of Boyd Strope as the "mastermind" attorney behind the series of transactions of which the Trustee complains, whether Gerald Kirwan actually paid the Partnership the initial $1,000 deposit on the Matthews and Partnership realty sale, and whether Gerald and Leona Kirwan had understood that the Kirwan ranch partners intended to default on their purchase of Randall Ranch stock) are relevant to a determination of fraudulent intent, and, in this adversary proceeding, are more appropriately addressed at trial. *See Demerath Land Co. v. Sparr*, 48 F.3d 353, 355 (8th Cir. 1995). In their reply, Gerald and Leona Kirwan also incorrectly stated that only Gerald Kirwan formed the Randall Ranch Partnership. James T. Kirwan was also an incorporator as indicated

by the documents filed with the Secretary of State.

II.
PREFERENTIAL TRANSFERS.

Under 11 U.S.C. § 547(b), a trustee may avoid a transfer to an insider that occurred within one year of the petition date if the transfer was for a debt that preceded the transfer, the debtor was insolvent at the time of the transfer, and the transfer enabled the creditor to receive more than it would have under a Chapter 7 liquidation.[5] *Buckley v. Jeld-Wen, Inc. (In re Interior Wood Products Co.)*, 986 F.2d 228, 230 (8th Cir. 1993). The trustee bears the burden of proof on each element of a preference under § 547(b). 11 U.S.C. § 547(g). The purpose of § 547(b) is to restore the bankruptcy estate to its pre-preferential transfer condition. *Halverson v. Le Sueur State Bank (In re Willaert)*, 944 F.2d 463, 464 (8th Cir. 1991).

What constitutes a transfer and when a transfer is complete is a question of federal law. *Barnhill v. Johnson*, 112 S.Ct. 1386, 1389 (1992)(cite therein). Under 11 U.S.C. § 101(54), a "transfer" is defined as

> every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property[6] . . ..

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[5] Section 547(c) sets forth certain exceptions to an avoidable preference. Gerald and Leona Kirwan have not relied on any of them.

[6] "Property" and "interests in property," in the absence of federal law, are defined by state law. *Barnhill*, 112 S.Ct. at 1389.

The definition is broad but the Court must "look to the real substance of the interests transferred, not to whether those interests are referred to as 'legal title' or [an] 'equitable interest.'" *Carlson v. FmHA (In re Newcomb)*, 744 F.2d 621, 626 (8th Cir. 1984).

It appears that a material fact is in dispute regarding whether a preferential transfer of the K+ Angus Ranch stock took place. While Gerald and Leona Kirwan argue that the Partnership never had an interest in the K+ Angus Ranch stock, the Real Estate Contract specifically states that this stock is part of the consideration to be paid by Gerald and Leona Kirwan *to the Partnership* as the seller, not to the individual partners. That the K+ Angus Ranch shares may not have been properly issued to the Partnership does not alone deprive the Partnership of any interest in them. It is a matter best sorted out at trial. Thus, Gerald and Leona Kirwan's Motion for Summary Judgment will be denied on this issue.

III.
IMPACT OF STATE COURT DECISION IN *VANDERWERF V. KIRWAN*
A. CLAIM PRECLUSION

Res judicata or "claim" preclusion applies where a final judgment has been rendered upon the merits by a court of competent jurisdiction. *W.A. Lang Co. v. Anderberg-Lund Printing Co. (In re Anderberg-Lund Printing Co.)*, 109 F.3d 1343, 1346 (8th Cir. 1997)(citing *Plough v. West Des Moines Community School District*,

70 F.3d 512, 517 (8th Cir. 1995)(quote therein)). The principle applies in federal bankruptcy proceedings, *Katchen v. Landy*, 382 U.S. 323, 334 (1966)(cited in *Anderberg-Lund Printing*, 109 F.3d at 1346), where the court must consider the law of the state in which the judgment was entered to determine its preclusive effect. *Harmon Industries v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999). In South Dakota,

> if the prior final judgment or order had been rendered by a court of competent jurisdiction, it is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein, whether the court was correct at the time or not.

Moe v. Moe, 496 N.W.2d 593, 595 (S.D. 1993)(cited in *In re SDDS, Inc.*, 97 F.3d 1030, 1039-40 (8th Cir. 1996)). The four factors to consider are (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical or in privity; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication. *Krull v. Jones*, 46 F.Supp.2d 997, 1003 (D.S.D. 1999)(citing *Springer v. Black*, 520 N.W.2d 77, 79 (S.D. 1994)); *Moe*, 496 N.W.2d at 595 (cited in *SDDS, Inc.*, 97 F.3d at 1040)).

The state court's decision in *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998), does not give rise to claim preclusion in this

adversary proceeding.[7] Trustee Lovald is not in privity with any party in that litigation. *United States ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F. Supp. 658, 664-65 (D.S.D. 1996). Further, the state court considered only whether Gerald and Leona Kirwan had notice of Vanderwerf's interest before they purchased the Matthews property from the Partnership. They did not decide whether the transfer of the Matthews and partnership property to Gerald and Leona Kirwan was for good consideration or whether the transfer was part of a fraudulent scheme to deprive Partnership creditors of equity in the Matthews and partnership property. The state court did not consider whether Gerald and Leona Kirwan received the Matthews and partnership property without inquiry notice of the Partnership's insolvency. *See* 11 U.S.C. § 548(c) and *Meeks v. Greenville Casino Partners (In re Armstrong)*, 217 B.R. 569, 575-75 (Bankr. E.D. Ark. 1998)(good faith of transferee does not pertain to the transferee's knowledge of the transferor's fraud but to the transferee's knowledge of the transferor's insolvency). Further, the state court could not have considered a preference claim under § 547. That cause of action arose only after the Partnership filed for bankruptcy relief. *In re Professional Coatings, Inc.*, 210 B.R. 66, 76 (Bankr. E.D. Va.

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[7] The *Rooker-Feldam* doctrine also does not apply because the Trustee's claims under federal law are separate from and collateral to the merits of the state court action between Vanderwerf and Gerald and Leona Kirwan. *See Fiedler v. Credit Acceptance Corp.*, 188 F.3d 1031, 1034-35 (8TH Cir. 1999).

1997). The evidence necessary to determine the state court cause of action and the Trustee's preference action are not the same. *Id.* at 76-78. Accordingly, claim preclusion does not arise from *Vanderwerf v. Kirwan*.

B. APPLICATION OF ISSUE PRECLUSION

The application of collateral estoppel or issue preclusion is a different matter than claim preclusion. *Grogan v. Garner*, 111 S.Ct. 654, 658-59 and 658 ns. 10-12 (1991); *Davis v. Massey (In re Massey)*, 228 B.R. 686, 690 (Bankr. S.D. Ind. 1998). Issue preclusion provides that a legal question or fact issue that has been previously decided by a court of competent jurisdiction cannot be re-litigated in a later action by the same parties or those in privity with the parties. *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990)(cited in *SDDS, Inc. v. State of South Dakota*, 994 F.2d 486, 492 (8th Cir. 1993). Issue preclusion is appropriately applied where: (1) the issue to be tried is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the party to be estopped was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Id.* *See generally Haberer v. Woodbury County*, 188 F.3d 957, (8th Cir. 1999); *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996)(general discussion of issue preclusion and privity).

The only conclusion reached in *Vanderwerf v. Kirwan* was that Gerald and Leona Kirwan had no notice of Vanderwerf's interest in the Matthews property at the time they purchased the property from the Partnership. That conclusion is not relevant to a determination of whether the K+ Angus Ranch Stock was preferentially transferred to them. That conclusion is also not relevant to a determination of whether the several land and stock transactions between Gerald and Leona Kirwan, the individual Kirwan Ranch partners, and Randall Ranch were fraudulent. Those transactions may be determined to be preferential or fraudulent regardless of whether Gerald and Leona Kirwan had notice of Vanderwerf's interest in the Matthews property. Further, the state court decision was, at best, made halfway through the series of alleged preferential or fraudulent transactions. Finally, Trustee Lovald was not in privy to any party in that action since he does not need to step into the Vanderwerfs' shoes to maintain either a preference action or a § 548(a)(1) fraudulent conveyance action against Gerald and Leona Kirwan.

Gerald and Leona Kirwan's Motion for Summary Judgment will be denied as to their arguments that claim preclusion or issue preclusion arise from *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998).

IV.
TIME LIMITATION TO COMMENCE SUIT UNDER § 548.

For the several reasons stated below, Gerald and Leona Kirwan's summary judgment motion will be denied on the issue that the Trustee's entire fraud claim is time barred under § 548(a)(1).

Section 548(a)(1) allows a trustee to avoid a debtor's fraudulent transfer of property that occurred on or within one year of the date the debtor's petition was filed. Gerald and Leona Kirwan argued that the relevant transfer date is December 12, 1995 when they executed a contract for deed to purchase the Matthews and partnership property from the Partnership and when they filed a notice of the contract. They base that conclusion on state law definitions of "transfer."

For the purpose of a fraudulent conveyance under § 548, federal law defines what constitutes a transfer, 11 U.S.C. § 101(54), and when that transfer is made. 11 U.S.C. § 548(d)(1). *See Official Committee of Unsecured Creditors v. Welsh (In re Phelps Technologies, Inc.)*, 238 B.R. 819, 824 (Bankr. W.D. Mo. 1999)(citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945)). State law may determine what interest in the transferred property that the debtor had, *Wood v. Bright (In re Bright)*, 241 B.R. 664, 666 n.3 (B.A.P. 9th Cir. 1999); *Towers v. United States (In re Feiler)*, 218 B.R. 957, 961 (Bankr. N.D. Cal. 1998); *Dews v. Dews (In re Dews)*, 152 B.R. 982, 984 (Bankr. D. Co. 1993), and when a transfer is perfected. *Cohen v. Bellamy (In re Shannis)*, 229 B.R. 234, 237 (Bankr. M.D. Fla. 1999).

Gerald and Leona Kirwan's summary judgment motion was erroneously based on state law definitions of "transfer" and when a transfer is complete. While the differences between S.D.C.L. § 54-8A-1(12) and 11 U.S.C. § 101(54) and between S.D.C.L.

§ 54-8A-6(1) and 11 U.S.C. § 548(d)(1) are minimal, Gerald and Leona Kirwan have not demonstrated that they are entitled to summary judgment under the appropriate federal definitions.

More important, Gerald and Leona Kirwan's motion for summary judgment focused exclusively on the contract for deed executed in December 1995. The Court concludes that the Trustee's fraudulent conveyance action under § 548 is more encompassing. The Trustee has argued that the entire series of transactions between Gerald and Leona Kirwan, the Partnership, the individual partners, and Randall Ranch were orchestrated and intended to deprive Partnership creditors of equity in the Partnership's realty. This series of transactions continued through December 18, 1996 (shortly before the Partnership filed bankruptcy on January 17, 1997) when Gerald and Leona Kirwan executed the Settlement Agreement with the individual Kirwan Ranch partners and took back all the K+ Angus Ranch stock that had been the partial consideration owed to the Partnership for the Matthews and partnership real property. That transfer, and several others during 1996, such as March 18, 1996 when Randall Ranch was incorporated; April 1, 1996 when Gerald and Leona Kirwan sold their interest in Randall Ranch; and June 10, 1996 when Gerald and Leona Kirwan transferred the Matthews and partnership realty to Randall Ranch, are all within the one-year reach-back provision. Further, Gerald and Leona Kirwan's apparent failure, at the realty sale closing in April 1996, to transfer title to the 4.4 shares of K+ Angus Ranch stock to the Partnership also occurred within one year of Debtor's petition. To conclude that the Trustee's action under § 548(a)(1) is time-barred because

an initial step in a series of alleged fraudulent transfers was outside the one-year reach-back provision would ignore the import of the other transfers.

Further, Trustee Lovald's fraud claim has also been brought under § 544 where the Trustee can utilize state fraudulent transfer statutes to avoid a transfer. The one-year reach-back provision in § 548(a)(1) has no application under § 544 and any non bankruptcy law incorporated by § 544; non bankruptcy law will govern any such limitation. *Dietz v. St. Edward's Catholic Church (In re Bargfrede)*, 117 F.3d. 1078, 1080 (8th Cir. 1997)(though § 548 did not apply, the case trustee could still seek recovery of fraudulent transfer made more than one year before the petition date under § 544 and applicable state law); *Butler v. Loomer (In re Loomer)*, 222 B.R. 618, 621 (Bankr. D. Neb. 1998)(general application of § 544(b)).

Finally, Gerald and Leona Kirwan also appear to have overstated the South Dakota Supreme Court's holding in *Hartman v. Wood*, 436 N.W.2d 854, 856 (S.D. 1989). That case does not hold that title always transfers to the purchaser on a contract for deed when the deed is placed is escrow. Instead, the court held that:

> [g]enerally, title to property under a deed deposited into escrow transfers when the escrow delivers the deed or when the conditions placed upon its delivery have been met. 28 Am.Jur.2d Escrow § 29 (1966). See also SDCL 43-4-11 (grant deposited with an escrow takes effect on delivery by the escrow). There is an exception to this rule holding that transfer of title by deed will be treated as relating back to the deed's original deposit into escrow where resort to this fiction is necessary to give the deed effect. 28 Am.Jur.2d Escrow § 29 (1966). Thus:

> Where the grantee in an escrow deed, after the deposit of the instrument in escrow but before the performance of the condition upon which it was to be delivered, makes a conveyance of the land to a third person, the escrow deed relates back to its original deposit, upon the performance of the condition, so as to validate the conveyance made by the grantee. (emphasis added).

Id. at S 35. See also Annotation, Escrow-Passing of Title-Relation Back, 117 A.L.R. 69, 83 (1938).

Hartman, 436 N.W.2d at 856. Here, there is no evidence that an interim conveyance of the contract for deed occurred between December 1995 and April 1996 so as to create the legal fiction that Gerald and Leona Kirwan had title to the Matthews and Partnership property before the April 1996 closing.

An appropriate order will be entered.

Dated this 12th day of January, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 12 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JAN 12 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By _____

Case: 99-03001 Form id: 122 Ntc Date: 01/12/2000 Off: 3 Page : 1
Total notices mailed: 5

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